We are of the view that a passage from the Privy Council decision in a Trinidad and Tobago case, *de Freitas* v. *Benny*[5] cited to us is particularly apt. It reads:

"Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the example of a purely discretionary act as contrasted with the exercise of a quasi-judicial function."

In this country the prerogative of mercy is vested in His Majesty the Yang di Pertuan Agong.

We also agree with the learned Attorney that we cannot, in any case grant an injunction to restrain the 1st respondent from carrying into effect a sentence in regard to which a warrant has been directed to him under section 281(d)(iii). See *Law Kiat Long & Ors.* v. *Pardons Board Johore*[6]

Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the *de Freitas case* – "Mercy is not the subject of legal rights. It begins where legal rights end." Any stay of execution would be only an extension of the prerogative of mercy, exercisable only by His Majesty the Yang di Pertuan Agong in accordance with Article 42 of the Constitution.

This application was accordingly dismissed.

*Application dismissed*

Solicitors: *Karpal Singh & Co.; Ngeow & Co.*

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## LEONG AH WENG v. NEOH THEAN SOO & ANOR.

**[F.C. (Raja Azlan Shah L.P., Mohamed Azmi & Abdoolcader F.JJ.) April 12 & May 7, 1983]**

**[Penang – Federal Court Civil Appeal No. 167 of 1982]**

*Practice and Procedure – Action for possession of land – Consent order – Lease granted for fixed term – No order for possession in consent order – No application for consequential order – Application for writ of possession – R.H.C. 1980, O. 43 r. 3(1)(a).*

In this case the respondents brought an action against the appellant for possession of land leased to him. The appellant joined issue on the claim but at the hearing a settlement was reached and a consent order made. The consent order provided that the respondents would grant a lease of the land to the appellant from March 16, 1978 and expiring on September 15, 1981. The appellant failed to give possession of the land on the specified date of its expiry. The respondents applied for leave to issue a writ of possession and this was granted by the learned Judicial Commissioner in the High Court. The appellant appealed. They appealed that the consent order did not contain an order for possession nor was any order for possession applied for.

**Held:** there were no order for possession on the expiry of the lease which is a prerequisite for its enforcement by a writ of possession as required by Order 45 rule 3(1)(a) of the Rules of the High Court 1980, and the learned Judicial Commissioner therefore could not and should not have given leave to issue a writ of possession in this case.

*Cases referred to:*

(1) *Fritz* v. *Hobson* (1880) 14 Ch. D. 542, 561
(2) *Societe des Etains de Bayas Tudjuh* v. *Woh Heng Mining Kongsi* [1978] 2 M.L.J. 267, 270
(3) *Sungei Biak Tim Mines Ltd.* v. *Saw Choo Teng & Anor. (No. 2)* [1970] 2 M.L.J. 226, 227
(4) *E.F. Philips & Sons Ltd.* v. *Clarke* [1970] Ch. 322

FEDERAL COURT.

*W.S.W. Davidson* for the appellant.
*Lim Kean Chye* and *T. Rajamoorthy* who did not appear below, for the respondents.

*Cur. Adv. Vult.*

**Abdoolcader F.J.** (delivering the Judgment of the Court): A consent order can at times veritably be *a pons asinorum* and this appeal illustrates the pitfalls in any temerarious resort to the enforcement of a compromise of an action by a consent order without thought to its form, substance or entailment.

The facts of the matter, briefly stated, are that the respondents instituted an action against the appellant for possession of some land leased out to him with consequential claims for damages and mesne profits. The appellant joined issue on the claim but at the hearing of the action the parties reported a settlement and sought and obtained a consent order on March 20, 1978 to the effect that on the payment by the appellant to the respondents of a sum of $8,900.000 within a specified period the respondents would grant a lease of the land in question to the appellant in terms of an agreed draft lease attached to the order commencing from March 16, 1978 and expiring on September 15, 1981, and it was further ordered that in the event of the appellant defaulting in complying with the order he was to deliver vacant possession of the land forthwith to the respondents. The lease itself specifically provided that it would expire on September 15, 1981 and that the appellant agreed and accepted that the respondents would not grant any further term after the expiry thereof.

The requisite payment under the order was duly made and a lease in terms of the draft entered into but the appellant failed to give possession of the land on the specified date of its expiry. The respondents then applied for leave to issue a writ of possession against the appellant on the basis of the consent order of March 20, 1978. Leave was accordingly granted by the learned Judicial Commissioner on November 25, 1981 in chambers and a writ of possession was in consequence issued on November 26, 1981. Apparently from the record of the proceedings the matter of leave to issue the writ of possession went for further argument in open court on May 10, 1982 and in a reserved judgment delivered on June 11, 1982 the learned Judicial Commissioner affirmed his decision granting leave to issue the writ. The appeal before us is against this order.

Order 45 rule 3(1)(a) of the Rules of the High Court, 1980 prescribes that a judgment or order for the giving of possession of immovable property may be enforced by a writ of possession. There was no such order for possession in the consent order of March 20, 1978 in respect of the lease entered into as a result of the compromise between the parties. The consent order as it stands would appear to have determined the proceedings instituted by the respondents' solicitors could have taken steps to protect their clients' interests by providing for this eventuality in the consent order but did not do so nor even seek an express provision in the order for liberty to apply. That aside, all orders of court carry with them *in gremio* liberty to apply to the court [*Fritz* v. *Hobson*[1] (at page 561 per Fry, J.)] as this is implied without its being expressly reserved [*Societe des Etains de Bayas Tudjuh* v. *Woh Heng Mining Kongsi*[2]; *Sungei Biak Tin Mines Ltd.* v. *Saw Choo Teng & Anor. (No. 2)*[3]. The respondents could have applied to court for an appropriate consequential order in the event that happened but failed to do so and without any order for possession sought leave to issue a writ of possession in flagrant disregard of the specific provisions of the rule of court we have referred to. Short of applying to court for an order for possession under the implied provision for liberty to apply it would appear that a fresh action would have been necessary to enforce the respondents' right to possession of the land in question.

We should perhaps touch on the rarity of recourse in our courts in compromises of actions to a *Tomlin order* which is one in the form directed by Tomlin, J., where an action is stayed by consent upon terms agreed between the parties and scheduled to the order with liberty to apply as to carrying such terms into effect [*Practice Note (1927) W.N. 290*]. In a *Tomlin order* liberty to apply is expressly stipulated and on an application strictly to enforce the terms embodied in the Tomlin order and the schedule thereto in the normally appropriate form with a qualified stay and liberty to apply, an order to give effect to those terms may be obtained under the liberty to apply in the original action, notwithstanding that they go beyond the ambit of the original dispute and could not have been enforced in the original action and even if the obligation did not then exist but arose for the first time under the compromise [*E.F. Philips & Sons Ltd.* v. *Clarke*[4]]. We stress the necessity to apply to court under the liberty to apply and the principle enunciated would appear to squarely cover the event that transpired in the instant appeal.

In the matter before us the terms of compromise between the parties embodied as a rule of court in the consent order of March 20, 1978 had been complied with and implemented. The term of the draft lease specified in the consent order and in the draft lease itself would make no difference to any requirement for an order for possession after the expiry of the lease in relation to enforcing the respondents' rights under the

consent order without more ado. There was no order for the giving of possession on the expiry of the lease which is a prerequisite for its enforcement by a writ of possession as required by the rules of court and learned Judicial Commissioner therefore could not and should not have given leave to issue a writ of possession in this case.

We accordingly at the conclusion of argument allowed this appeal with costs here and below, set aside the writ of possession and the leave granted for its issue and ordered the deposit lodged in court by way of security to be paid out to the appellant to account of his cost.

*Appeal allowed.*

Solicitors: *Azman, Davidson & Co.; Jayadeva & Kamal.*

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## PARUVATHY D/O MURUGIAH v. KRISHNAN S/O DORAISAMY

**[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Seah F.JJ.) February 7, & May 16, 1983]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 98 of 1982]**

*Land Law – Temporary Occupation Licence – Assignment illegal – Whether doctrine of equitable estoppel applies against holder of temporary occupation licence – House on land built by person at the cost of holder of licence – Contracts Act 1950, s.24 – National Land Code, s.68.*

In this case the appellant was the holder of a temporary occupation licence of a piece of land in Seremban. The respondent built a house on the land and claimed that he was entitled to do so by virtue of a document made between the appellant and himself and one Thangavelu whereby the appellant gave "equal shares" in the land to the respondent and Thangavelu. The appellant claimed possession of the land and house. The respondent claimed that he had a right to stay on because of the document executed by the appellant and because he had built the house at the request and with the consent of the appellant. The learned Magistrate found that the house was built by the respondent at the request and with the consent of the appellant, but further held that although it was so built the respondent had no equitable estoppel because in her view the principle of equitable estoppel only applied, where the person against whom the principle is involved, is the owner of the land in question. The learned Magistrate however held that the respondent did obtain an interest in the land which came to an end "somewhere five years from the date of the notice." She therefore gave judgment to the appellant and ordered the respondent to deliver vacant possession and pay $160 by way of damages for staying over.

On appeal the learned Judicial Commissioner in the High Court ruled that the principle of equitable estoppel applied and continues so long as the TOL subsists. He therefore reversed the decision of the learned Magistrate.

The appellant appealed.

**Held,** (1) the principle of equitable estoppel can in a proper case be invoked against the holder of a temporary occupation licence;

(2) in this case however the document purported to be executed by the appellant was void for illegality as it was in contravention of section 68 of the National Land Code, as it purported to transfer the rights and interests of the appellant in the TOL;

(3) on the facts the document was also a fraudulent document and therefore the principle of equitable estoppel could not arise in the respondent's favour;

(4) although the house was built by the respondent it was built with the money of the appellant and therefore its ownership was with the appellant;

(5) no evidence was led by the appellant on the question of damages and in the circumstances the appellant should be given vacant possession of the land and house and token damages of $10.00.

*Cases referred to:*

(1) *Inwards & Ors.* v. *Baker* [1965] 1 All E.R. 446.
(2) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 170.
(3) *Plimmer's Case* (1884) 9 App. Cas. 699, 713, 714.
(4) *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.
(5) *Murugesan* v. *Krishnasamy & Anor.* [1958] M.L.J. 92.
(6) *Chalmers* v. *Pardoe* [1963] 3 All E.R. 552.

FEDERAL COURT.

*G. Sri Ram* for the appellant.

*Joseph Chia* for the respondent.

*Cur. Adv. Vult.*

**Salleh Abas C.J. (Malaya)** (delivering the judgment of the Court): This is an appeal from the decision of the learned Judicial Commissioner, Seremban, which itself arose from the decision of the Seremban Magistrate giving judgment for the appellant/plaintiff. The facts are as follows:

The appellant is the holder of a temporary occupation licence (TOL) in respect of a piece of land held under L.T.S. No. 1544 of Mukim of Rasah, Seremban. The TOL was originally issued to her husband, but after his death, the Seremban Collector of Land Revenue has since September 10, 1974 issued it to her. Two houses were built on the land, one of which was built in 1974